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No. 01-678

IN THE

Supreme Court of the United States

MOTION PICTURE INDUSTRY PENSION AND HEALTH PLANS,
Petitioner,

v.

N.T. AUDIO VISUAL SUPPLY, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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9 pp

TABLE OF CONTENTS

	Page
REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	1
ERISA REQUIRES EMPLOYERS TO MAINTAIN RECORDS WITH RESPECT TO ALL EMPLOYEES, AND ENTITLES AN EMPLOYEE BENEFIT PLAN TO CONCLUDE THAT CONTRIBUTIONS ARE DUE WITH REGARD TO ALL EMPLOYEES IF SUCH RECORDS ARE NOT MAINTAINED	2
CONCLUSION	5

TABLE OF AUTHORITIES

CASES	Page
Central States,Southeast and Southwest Areas Pension Fund v. Central Transport, 472 U.S. 559 (1985)	*passim*
Michigan Laborers Health Care Fund v. Grimaldi Concrete, 30 F.3d 692 (6th Cir. 1994)	4-5
STATUTES	
29 U.S.C. §1059(a)(1)	2

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Respondent's brief in opposition to the petition for certiorari clearly describes the approach taken by the Ninth Circuit in the case below. In doing so, that brief also illustrates the sharp difference between the decision below, on the one hand, and on the other hand, the approach dictated by statute, by the decision of this Court in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport*, 472 U.S. 559 (1985), and by the decisions of other circuits.

As accurately described by Respondent's brief, the Ninth Circuit now holds that employee benefit plans have the burden of showing whether employees performed work requiring contributions to a multi-employer benefit plan, despite the failure of the employer to comply with the ERISA-mandated obligation to maintain such records.

Contrary to the assertions of Respondent and the conclusion reached in the decision below, ERISA requires that an employer maintain records of the work of *all* employees, such that plans can determine *from those records* whether contributions were required. Based on that obligation, this Court, the Ninth Circuit in its *Brick Masons* decision, and other circuit courts have concluded that the failure to maintain such records entitles a plan to conclude that all employee work during the period of time in question is subject to contributions.

ERISA REQUIRES EMPLOYERS TO MAINTAIN RECORDS WITH RESPECT TO ALL EMPLOYEES, AND ENTITLES AN EMPLOYEE BENEFIT PLAN TO CONCLUDE THAT CONTRIBUTIONS ARE DUE WITH REGARD TO ALL EMPLOYEES IF SUCH RECORDS ARE NOT MAINTAINED

The most telling part of Respondent's brief is its failure to address the statute upon which this entire issue is based: ERISA section 209(a)(1), 29 U.S.C. §1059(a)(1). That statute requires every employer to keep records with respect to "*each of his employees* sufficient to determine the benefits due or which may become due to such employees." (emphasis added).

This omission from Respondent's brief could not have been accidental. Reference to the statute makes it very clear that the decision below—and Respondent's argument here—departs from the statute and from previous case law. An employer is statutorily required to maintain records with regard to *all* of its employees, not just those whom the employer asserts are subject to contributions. The reason for this requirement is to permit employee benefit plans to determine, through an audit of those records, whether contributions have been properly made. The failure of an

employer to maintain such records permits the plans to conclude that contributions are due with regard to all employees.

The heart of Respondent's argument is that employee benefit plans must show "the fact of damage," i.e., that a particular employee performed "covered" work requiring contributions to the plan. Unless the plan can demonstrate that an employee did such work, Respondent claims that the plan is not entitled to presume that the work performed by that employee was covered work.

This assertion will negate, or at least substantially undermine, the employer's ERISA mandated obligation to maintain records with regard to *all* employees, *whether or not they are participants in the plan.* By keeping such records, the plan can determine, by auditing company records, whether contributions were made with regard to all covered work. If an employer only needs to keep records with regard to those employees who the employer maintains are participants in the plans, an audit of employer records will be unable to uncover delinquencies. As Respondent admits, (Respondent's Brief in Opposition, pp. 13-14), the auditors will indeed have to go outside of employer records to discover such omissions.

Multi-employer plans most commonly exist in freelance industries such as the entertainment and construction industries. In those industries, the very fact that employees work for many different employers make such plans the only realistic way to deliver pension and health benefits. In such industries, the employees who are subject to a plan audit often will no longer be working for that employer or even in the industry. In addition, such employees will often be looking for work from the very employers who are denying coverage. If the decision below is permitted to stand, plans will bear the burden of determining the identity of the employees for whom contributions might be owed, locating

every single employee, wherever they might be, to determine whether or not they performed covered work, and then persuading these employees that they should give evidence against employers with whom they may be seeking work. Since plans commonly audit over a four year period, this could involve interviewing hundreds, if not thousands of employees for whom contributions were not made to determine whether they engaged in covered work.

This issue is at the very core of this Court's *Central States* decision. In that case, an employer objected to a plan audit because the employer asserted that 60% of its employees were not plan participants. *Central States*, 472 U.S. at 563. The Court upheld the right of an employee benefit plan to audit *all* employee records, including those for employees the employer claimed were not plan participants. As the Court explained, the audit was necessary to further the plan's duty to determine "who is in fact a plan participant" and to "prevent participant employers from gaining even temporary use of assets to which the plan is entitled." 472 U.S. at 572.

The decision below would completely eviscerate the Court's holding in *Central States*. While a plan would continue to have the right to audit all of the employer's records, that audit right would often become meaningless since the employer would not have a meaningful obligation to maintain the records which the plan would need for its audit. If the employer failed to maintain adequate records, the plan would have no effective remedy. The plan would have to go outside of the employer's records to determine whether contributions were due. As noted above, and in the briefs previously filed by Petitioner and *Amici Curiae*, this will often be impossible or impracticable.

The Sixth Circuit in *Michigan Laborers Health Care Fund v. Grimaldi Concrete*, 30 F.3d 692 (6th Cir. 1994) squarely addressed this issue. In that case, employees of the construction firm engaged in both covered and non-covered

work under the agreement. The employer failed to keep records for over 80% of its workforce, and the records it kept for the other 20% were incomplete. Thus, there was no way for the plan to determine what work was covered and what work was not covered. The Sixth Circuit held that because the employer failed to keep adequate records, "the burden shifted to [the employer] to prove what work was covered and what was not covered." 30 F.3d at 696.

Although Respondent refers to certain language in other circuit court decisions from which Respondent asserts that those courts would require the plan to demonstrate "the fact of damage" as described by Respondent, a review of those decisions demonstrates that these courts did not address this issue. Suffice it to say that even if these decisions could be considered to substantiate Respondent's position, they are contrary to the statute, this Court's decision in *Central States*, and the policy considerations underlying both. In addition, if consistent with the decision below, they illustrate further the need to clarify the law, since they would be directly contrary to the Sixth Circuit's *Grimaldi* decision.

CONCLUSION

This case raises an important question of statutory interpretation. Do employee benefit plans, in fulfilling their duty to preserve plan assets, have a right to rely on an employer's statutory obligation to maintain records for their employees? Or, do employee benefit plans have the burden of demonstrating that an employee performed some covered work even where an employer failed to keep records from which the nature of the employee's work can be determined?

If left standing, the Ninth Circuit's decision below will substantially undermine the statutory obligation to maintain records and will erect substantial and unnecessary barriers to benefit plan audits.

This Court should grant this Petition in order to ensure that its landmark decision in *Central States* is not undermined, and so that the financial integrity of employee benefit plans is not eroded.

Respectfully submitted,

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